COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss. **Department of Public Safety**
Docket No. 16-EC-0364

In Re: P&G Gillette SBMC
Expired Elevator Certificate: #1-W-12993

DECISION

Procedural History

This matter is before the Department of Public Safety ("DPS") because Richard Inglis, director of facilities operations for Sodexo Corporate Services,[1] filed an appeal for administrative review, dated October 3, 2016, pursuant to 520 CMR[2] 16.03, of a civil fine imposed pursuant to Massachusetts General Law ("M.G.L.") c. 143, § 65 and 520 CMR 16.02 ("Appeal").

DPS had issued a Notice of Expired Elevator Civil Fine, dated September 6, 2016, imposing a civil fine in the total amount of $20,000 for a violation of M.G.L. c. 143, § 65.

Exhibits

The following documents were entered into evidence:

1. Notice of Expired Elevator Civil Fine, dated September 6, 2015; and
2. October 7, 2016 letter in support of the appeal, signed by Mr. Inglis.

Findings of Fact

The following findings of fact and conclusions of law are supported by substantial evidence, based upon documents admitted into evidence, testimony, and DPS records. *M.G.L. c. 30A, § 11(2), § 14(7).*

1. P&G Gillette SBMC is the owner of record for the elevator with State ID #1-W-12993.
2. The Certificate for Use of the elevator with State ID #1-W-12993 expired on October 31, 2014.

[1] He is listed in the DPS online data management system as the named appellant's primary contact so is presumed to be its authorized representative.
[2] Code of Massachusetts Regulations.

3. On September 6, 2013, DPS received an application for an annual inspection of elevator #1-W-12993.
4. Pursuant to M.G.L. c. 143, § 65, a fine in the total amount of $20,000 was imposed for the elevator, calculated by multiplying the number of days from and including March 1, 2014 through September 5, 2016 (i.e. >200 x $100).

Discussion

The issue is whether the owner failed to comply with applicable legal and regulatory requirements for operating elevators. M.G.L. c. 143, § 65 mandates:

> No elevator licensed under this chapter shall be operated without a valid inspection certificate. If a certificate has expired, no new certificate shall be issued until a new inspection has been completed and no elevator shall be operated until a new certificate has been issued by a qualified state inspector. The owner or operator of an elevator who fails to comply with this section shall be punished by a fine of $100 for each day that an elevator is in operation without a valid certificate. The commissioner or the commissioner's designee may waive all or a portion of the $100 per day fine and may promulgate rules and regulations establishing criteria used to determine whether the fine may be waived. For purposes of this section, an elevator shall be deemed to be in operation unless it has been placed out of service or decommissioned in accordance with procedures approved by the board. Fines shall stop accruing on the date on which the owner or operator has, in writing or in any manner prescribed by the department, requested an inspection of the elevator by the department. For any unit that has a travel distance of 25 feet or less and is located in an owner-occupied single family residence in accordance with section 64, the maximum fine shall be $5,000. For all other units, the maximum fine shall be $20,000. *M.G.L. c. 143, § 65, as amended by St. 2014, c. 165, § 167, effective July 1, 2014 (St. 2014, c. 165, § 291).*[3]

The law is currently reflected in 520 CMR 16.02 [effective August 14, 2015, amended July 1, 2016]. An inspection certificate is required pursuant to M.G.L. c. 143, § 65, 524 CMR 1.01, and 520 CMR 16.02(2). The owner must ensure compliance. *M.G.L. c. 143, § 65; 524 CMR 1.09.* The original regulation implementing civil fines for § 65 violations, 520 CMR 1.03, became effective on July 1, 2013. See *520 CMR 1.00*.

In the instant case, the $100-per-day civil fine began to accrue on November 1, 2014, given the October 31, 2014 Certificate expiration date. DPS received the annual inspection application on September 5, 2016. Accordingly, there was evidence to support initially issuing a civil fine in the total amount of $20,000 for the subject device.

[3] This language precedes additional amendments effective as of July 2016.

However, pursuant to 520 CMR 16.03 (effective August 14, 2015, amended July 1, 2016) a civil fine may be waived or reduced. All or part of the $100-per-day fine imposed pursuant to M.G.L. c. 143, § 65 may be waived, or the fine may be affirmed, after considering the following factors: (a) the *willfulness of the violation*; (b) *previous violations*; (c) *clerical errors*, including, but not limited to, inadvertent errors on the application for annual inspection; (d) *inaccurate assessment* of the fine, based on evidence that the fine was issued in excess of or contrary to statutory authority or regulation, or based on incorrect information; (e) *lack of prior use*, including proof that the unit was not capable of being operated at the time that the fine was assessed; (f) *de minimis risk of injury to the* public, including proof that members of the public were incapable of accessing the elevator for the entire period of operation without a valid certificate; (g) *financial hardship* (described in detail in 520 CMR 16.03(6)(g)). *520 CMR 16.03(6).*

The appellant's bases for the appeal are lack of willfulness, lack of prior violations, clerical error, lack of prior use and de minimis risk of injury to the public, as indicated on the Appeal of Civil Fine form and in Mr. Inglis' supporting letter. These arguments are addressed below.

Willfulness of Violation

With no evidence to the contrary, the proposition that the appellant did not act willfully in failing to timely submit its application for annual test of the subject elevator is deemed true for purposes of this decision, particularly where it submitted an application for the annual test upon realizing it was not in compliance. Such lack of willfulness warrants mitigation of the fine and shall be reflected in the order below.

Prior Violations

Although Mr. Inglis states that "the site has not received any previous violations," DPS records indicate that the appellant has received prior violations with respect to 520 CMR 16.[4] In light of this fact, this is considered a recidivist violation.

Clerical Errors

With respect to the factor of clerical error, the regulation states: Substantial evidence of a clerical error shall include, but not be limited to, inadvertent errors on the application for annual inspection. 520 CMR 16.03(6)(c).

Mr. Inglis argues that "I have not ever received any type of notification from the State/Department of Public Safety saying that these specific units needed safety inspection, or

[4] See Dockets #EC-2015-1310, 1311, 1316 and 1317 in which the violations were affirmed for failure to submit applications prior to certificate expiration on October 31, 2010, March 31, 2013 and December 31, 2013, respectively.

that there was a penalty … levied against the equipment for a late permit application and … no other individuals at our site were ever made aware ….”

DPS is not responsible to provide notices to device owners when their elevator certificates are nearing expiration, however. Any such letter that may be provided is a mere courtesy, not an obligation. Rather, device owners and their legal agents are “responsible for the care, maintenance and safe operation of all equipment covered by 524 CMR ….” 524 CMR 1.09. This includes making or causing to be made “all periodic tests and inspection ….” Ibid.

Lack of Prior Use

With respect to ‘lack of prior use’, the regulation states that “[s]ubstantial evidence of lack of prior use shall include proof that the unit was not capable of being operated at the time that the fine was assessed.” 520 CMR 16.03(6)(e).

Mr. Inglis states that “I have not ever seen these lifts used.”

Even if true, this fails to establish lack of prior use for the regulation’s purposes in that it does not demonstrate that the unit was incapable of operation during the entire period of noncompliance. Additional reduction to the fine is not justified, therefore.

De Minimis Risk of Injury

The regulation states: “Substantial evidence of a de minimis risk of injury shall include proof that members of the public were incapable of accessing the elevator for the entire period of operation without a valid certificate.” 520 CMR 16.03(6)(f).

Finally, Mr. Inglis asserts that the subject device is “closed off to the public as access to the site from a public space is only made available through security clearance – the only people who have access to this equipment are the employees in the building.”

Such assertion is deemed sufficiently detailed and credible to establish that the public could not access this device during the noncompliance period. This de minimis risk warrants additional mitigation of the penalty which shall be reflected in the order below.

Conclusion and Order

The violation is **AFFIRMED.** However, the penalty is **REDUCED** upon a determination of lack of willfulness and de minimis risk of injury to the public. The appellant is, hereby, **ORDERED** to immediately pay the **TOTAL FINE of $9,000** to the Department of Public Safety.

SO ORDERED
Department of Public Safety
By its designee,

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JAMES M. PLOTKIN
Hearings Officer

DATED: January 6, 2017

In accordance with 520 CMR 16.03(3), you may request a hearing in writing within 30 days of receipt of this decision if the requested relief is denied in whole or in part.[5] If a hearing is not requested, payment of any fine upheld herein is due within 30 days of the date of this decision in accordance with 520 CMR 16.03(7). If you do not request a hearing and fail to pay any fine upheld herein, the DPS may shut down the elevator pursuant to 524 CMR 8.03, 524 CMR 7.03 and 520 CMR 16.03(7).

[5] Hearing requests must be in writing, include the case docket number and should be addressed to:
Sebastian Giuliano
Civil Fine Administrator
Department of Public Safety
One Ashburton Place, Room 1301
Boston, MA 02108